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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DANIEL GARCIA,

Defendant and Appellant.

B301842

(Los Angeles County
Super. Ct. No. KA078290)

APPEAL from an order of the Superior Court of Los Angeles, Salvatore Sirna, Judge. Reversed and remanded with directions.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Nicholas J. Webster, and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Appellant.

Anthony Daniel Garcia appeals the September 16, 2019 order denying his petition for recall of sentence pursuant to Penal Code section 1170.126,¹ which he filed without benefit of counsel, contending the superior court erred in ruling he was ineligible for resentencing because his conviction for obstructing or resisting an executive officer was a serious or violent felony.² The Attorney General concedes the court erred, but argues the petition was properly denied because it was untimely and Garcia made no attempt to establish good cause for his delay in filing. In the alternative, the Attorney General suggests we remand the matter with directions to the superior court to consider the timeliness of the petition, including any explanation by Garcia for his delay, and, if Garcia establishes good cause for the untimely filing, to consider Garcia's eligibility for relief on the merits. In his reply brief Garcia embraces this alternative proposal, as do we.

¹ Statutory reference are to this code unless otherwise stated.

² In a separate order on September 16, 2019 the superior court denied Garcia's request for clarification of his eligibility for parole consideration under Proposition 57. In the introduction to his opening brief Garcia indicates he is also appealing this order, but he does not otherwise address Proposition 57 in either the opening or reply brief. Any possible issue regarding that order has been forfeited. (Cal. Rules of Court, rules 8.204(a)(1)(B), 8.360(a); see *Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372, fn. 12.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *Garcia's Convictions and State Prison Sentence*

Garcia was convicted following a jury trial of grand theft of an automobile (§ 487, subd. (d)(1)), kidnapping (§ 207, subd. (a)), obstructing or resisting an executive officer (§ 69) and transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)). The trial court found true special allegations that Garcia had suffered two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and one prior serious felony conviction pursuant to section 667, subdivision (a), and had served two prior separate terms for felonies (§ 667.5, subd. (b)). The court sentenced Garcia to an aggregate indeterminate state prison term of 55 years to life. (See *People v. Garcia* (Aug. 31, 2009, B206563) [nonpub. opn.].) Garcia's sentence included two consecutive terms of 25 years to life for grand theft and obstructing or resisting an executive officer. Concurrent prison terms were imposed for the other two felony convictions. On appeal we reduced the grand theft conviction to taking or driving a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)), affirmed the other convictions and remanded the case for resentencing.

On remand Garcia was again resentenced to an aggregate indeterminate state prison term of 55 years to life, a sentence that now consists of two consecutive terms of 25 years to life for kidnapping and obstructing or resisting an executive officer, plus a five-year prior serious felony sentencing enhancement. The court imposed and stayed the sentence on the Vehicle Code offense and imposed a concurrent term for transporting a

controlled substance. We affirmed the judgment on appeal. (*People v. Garcia* (May 10, 2011, B222521) [nonpub. opn.])

2. *Garcia's Petition for Recall of Sentence*

On July 29, 2019 Garcia, representing himself, petitioned pursuant to Proposition 36, The Three Strikes Reform Act of 2012 (§ 1170.126), for recall of his sentence and resentencing for obstructing or resisting an executive officer.³ On September 16, 2019, without Garcia being present or represented by counsel, the court denied the petition. Its order stated, “Defendant is not eligible for resentencing pursuant to Penal Code section 1170.126(e)(1).” Section 1170.126, subdivision (e)(1), provides an inmate is eligible for resentencing if, “The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.”

³ In December 2015 Garcia petitioned pursuant to Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18), to reduce to a misdemeanor his felony conviction for obstructing or resisting an executive officer. The superior court denied the petition, ruling none of Garcia’s four felony convictions was eligible for reduction to a misdemeanor under Proposition 47. We affirmed the order to the extent it addressed Garcia’s conviction for obstructing or resisting an executive officer, but reversed as to his Vehicle Code conviction because the issue whether that offense could be reduced to a misdemeanor under Proposition 47, then pending before the Supreme Court in *People v. Page* (2017) 3 Cal.5th 1175, had not been presented by Garcia’s petition. (*People v. Garcia* (May 15, 2017, B270278) [nonpub. opn.])

Garcia filed a timely notice of appeal.

DISCUSSION

1. Governing Law

Proposition 36 was intended to “[r]estore the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime” and to permit “repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession [to] receive twice the normal sentence instead of a life sentence.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1.) As part of its goal of limiting indeterminate life sentences to serious or violent felony offenders, Proposition 36 added section 1170.126, which permits inmates previously sentenced to life terms under an earlier version of the three strikes law to petition to recall their sentences and, if eligible for relief, to be resentenced to the term that would have been imposed for their crime under the new sentencing provisions. (§ 1170.126, subd. (a).)

Eligibility for resentencing depends on several factors. An inmate will be denied resentencing if (1) the current offense was serious or violent; (2) the prosecution establishes one of four disqualifying exceptions to resentencing under Proposition 36; or (3) the superior court determines, in its discretion, that resentencing the inmate would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (e) & (f).)

An inmate is eligible for resentencing on a qualifying current offense under Proposition 36 despite his or her contemporaneous conviction for one or more other offenses that are serious or violent. (*People v. Johnson* (2015) 61 Cal.4th 674, 675, 695.) That is, the superior court must determine eligibility

for relief under section 1170.126, subdivision (e), on a count-by-count basis. (See *Johnson*, at p. 688.)

2. *Obstructing or Resisting an Executive Officer Is Not a Serious or Violent Felony*

As Garcia argues and the Attorney General concedes, obstructing or resisting an executive officer in violation of section 69 is not a serious or violent felony as defined by sections 667.5, subdivision (c), or 1192.7, subdivision (c). Accordingly, the superior court erred in ruling Garcia was not eligible for resentencing pursuant to section 1170.126, subdivision (e)(1).

3. *Remand Is Appropriate To Provide Garcia an Opportunity To Demonstrate Good Cause for His Late Petition*

Section 1170.126, subdivision (b), provides that a petition for recall of sentence under the resentencing provisions of Proposition 36 must be filed “within two years after the effective date of the act that added this section or at a later date upon a showing of good cause.” Proposition 36 became effective on November 7, 2012. (See *People v. Johnson*, *supra*, 64 Cal.4th at pp. 682-683.) Garcia’s petition was not filed until July 29, 2019. Absent a showing of good cause, Garcia’s petition is properly denied as untimely.

As discussed, the superior court denied Garcia’s petition on the merits; it did not question the timeliness of the petition filed by Garcia in propria persona or his failure to make a showing of good cause for the delay. Not surprisingly, therefore, in his opening brief on appeal Garcia’s appointed counsel argued only that obstructing or resisting an executive officer was not a serious or violent felony and that under *People v. Johnson*, *supra*,

64 Cal.4th 674 Garcia’s sentence for that offense could be recalled even though Garcia had also been sentenced to a consecutive term of 25 years to life for simple kidnapping, a violent felony (see § 667.5, subd. (c)(14)).

In his respondent’s brief the Attorney General quotes at length from *People v. Drew* (2017) 16 Cal.App.5th 253, in which the court of appeal rejected the petitioning inmate’s argument that his lack of counsel and consequent ignorance of his right to request resentencing under Proposition 36 established good cause for the delay in filing.⁴ “Were this contention accepted,” the court reasoned, “it would be tantamount to erasing the limitations period from the statute in all but the most unusual of circumstances.” (*Id.* at p. 259.) The court continued, “Certainly, we do not suggest a good cause showing requires that an untutored layman such as Drew undertake yeoman efforts in an effort to navigate the intricacies of [Proposition 36]. But neither do we accept Drew’s claim on appeal that faced with years during which there is no hint of activity or even de minimus effort by the

⁴ In the superior court Drew had claimed, until the Supreme Court’s decision in *People v. Johnson*, *supra*, 61 Cal.4th 674, it was unclear an inmate convicted of several felonies, one of which was a serious or violent felony, could seek recall and resentencing for an offense that was not serious or violent. The *Drew* court of appeal, noting that at least one appellate court had earlier held an inmate could be eligible for resentencing on a qualifying offense notwithstanding his convictions for other nonqualifying offenses, indicated it would not be an abuse of discretion for the superior court to reject that argument as the basis for a finding of good cause. (*People v. Drew*, *supra*, 16 Cal.App.5th at p. 259.) Drew abandoned that contention on appeal. (*Ibid.*) Here, as the Attorney General points out, Garcia’s petition was filed more than three years after the Supreme Court’s decision in *Johnson*.

inmate to protect his rights, a trial court abuses its discretion when it determines there is no good cause to dispense with the legislatively prescribed deadline for filing recall petitions.” (*Id.* at p. 260.)

Here, as Garcia argues in his reply brief, the record is entirely undeveloped as to the reasons for Garcia’s delay in filing the petition. Under these circumstances, as the Attorney General suggests as an alternative to affirming the order denying the petition on a ground not addressed by the superior court, it is appropriate to remand the matter to permit Garcia to explain his delay, so the superior court may evaluate his justification and determine in the first instance whether it constitutes good cause. (See *People v. Drew*, *supra*, 16 Cal.App.5th at p. 257 [in evaluating whether good cause exists, the court should examine “the nature and strength of the justification for the delay” and “the duration of the delay”].)

DISPOSITION

The order denying the section 1170.126 petition is reversed, and the cause is remanded with directions to the superior court to consider whether good cause exists for Garcia’s delay in filing the petition and, if so, to consider the petition on its merits pursuant to section 1170.126, subdivisions (e), (f) and (g).

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.